

## Involvement and Impact of External Actors on Constitution Making in South Sudan and Somaliland: A Comparative Study

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**Katrin Seidel**

# **Involvement and Impact of External Actors on Constitution Making in South Sudan and Somaliland: A Comparative Study**

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## Abstract

In order to examine the implications different forms and degrees of internationalised constitution making have on ideas of statehood and the legitimacy of a constitution, the study compares two cases—South Sudan and Somaliland—to explore contrasting patterns of international involvement in constitution making. South Sudan is the one ‘extreme’ case with strong international intervention, with Somaliland at the other ‘extreme’. This paper demonstrates that the actual process matters and once again reinforces scepticism about the ways in which internationalised constitution making is conducted in war-torn settings. In Somaliland the societal consensus production, which included negotiating a governmental structure, was in the hands of the local elites for the constitution-making period, which lasted a decade. In South Sudan the consensus production has so far been framed and guided by powerful international actors who had a seat at the local negotiating table. Not only does path dependence seem to prevent the production of a broader consensus on the mode of statehood, but the local translations of international ‘models’ also seem to be contrary to intended *Rule of Law* ideas. The study indicates that even though a locally driven and owned process supports the production of a legitimate constitution, international support is not generally denied. Inherent tensions between ‘local ownership’ and ‘external intervention’ may open space for re-negotiations on different normative perceptions and may support a redefinition of exclusion/inclusion dynamics. Nevertheless, to avoid these tensions becoming un-negotiable as a result of the imposition of international assistance which may lead to international ‘models’ simply being rejected or manipulated in line with internal power relations, constitution making needs to be conducted in an open manner by the local actors themselves.

## Keywords

*Constitution making, Rule of Law, South Sudan, Somaliland*

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# Involvement and Impact of External Actors on Constitution Making in South Sudan and Somaliland: A Comparative Study\*

Katrin Seidel

## I Introduction

Even though external actors have influenced the making of constitutions throughout history<sup>1</sup>, in the last two decades, the increased international interventions during and after violent civil and intra-state conflicts have often been extended to constitution building.<sup>2</sup> In the wake of conflict or in attempts to anticipate violent conflict resolution, drafting a new constitution seems to have become imperative to (re-)establishing the basis of state legitimacy. The idea is to develop and build a political community, premised on the drawing up of rules for the allocation, accountability, and exercise of power. The post-cold-war experiences are shaped by the universalisation of certain ideas of statehood and an enormous rise in international organisations, regulations and fora<sup>3</sup> whereby constitution making is used as a state-making tool<sup>4</sup> within broader 'rule of law' (RoL) frameworks<sup>5</sup>. This recent surge of international involvement has not only changed 'traditional' ways of constitution making, but has also created 'a veritable industry [...] whereby constitutional technicity – exemplified in the provision of technical expertise – has become a central feature of contemporary constitution-making practice'<sup>6</sup>.

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<sup>1</sup> Schauer 2004: 901ff.

<sup>2</sup> The vague term 'international actors' comprises individual activists and academics, individuals and groupings of states, (supra-)regional institutions, non-local NGOs, commercial enterprises, research institutions/think tanks, etc.

<sup>3</sup> Schneckener 2016: 2.

<sup>4</sup> Ludsin 2011: 242f; Hay 2014: 141–68; Turner et al. 2015; Wolfrum 2005: 649ff; Chesterman 2004; von Bogdandy et al. 2005: 579ff; Choudhry 2005: 933–45; Dann and Al-Ali 2006: 424, Narten 2008.

<sup>5</sup> May 2014b; Humphreys 2010; Costa and Zolo 2007; Carothers 1998: 95–106.

<sup>6</sup> Kendall 2013: 2–3.

Since constitution-making processes are supposed to be guided by the respective socio-historical experiences, taking into account the perceptions, emotions and hopes of the people<sup>7</sup>, the research assumption is that the 'making' itself opens up space and fora for continuously re-negotiating statehood and plurality. In order to examine the implications that different forms and degrees of internationalised constitution making<sup>8</sup> have on ideas of statehood and (constitutional) legitimacy, this paper compares two 'polar types'<sup>9</sup>. To explore contrasting patterns of international involvement in constitution making, South Sudan is the one 'extreme' case with strong international intervention, and Somaliland is the other 'extreme' case in which a similar intervention is almost completely lacking.

The similarities between South Sudan's and Somaliland's constitution making are manifold: both countries are geographically and socio-historically part of the broader Horn of Africa region. They are characterised by coexisting, intertwined normative orders<sup>10</sup>. Local laws<sup>11</sup> with various perceptions of loyalty, authority and conflict resolution mechanisms are the predominant normative tools to regulate social interactions. Moreover, after decisive and long armed struggles, both regions seceded from their respective unities, specifically from Sudan and from Somalia. Accordingly, there were, respectively are changing patterns of violent and non-violent negotiations on the mode of statehood affecting the debates on a constitution in both emerging states. The constitution-making processes are neither institutionalised as stable procedures nor clearly defined spaces of action among well-defined bodies of participating actors. In an attempt to create the fiction of a 'territorial modern nation state'<sup>12</sup>, constitution making in both emerging states has revolved around the construction of sovereignties in an attempt to control territorial borders, to more clearly define an interior space and to convince the people that this interior space does exist. Elites therefore negotiate the scope of state institutions with multiple governance authorities at different levels. Constitution making thus becomes a way of negotiating the state's functions and mainly takes place among the political leaders themselves<sup>13</sup>. The common openness of negotiations and the socio-historical and geographical parallels provide many opportunities to compare and distinguish the negotiation of modes of statehood.

With regard to the differences between the two chosen cases, the constitution-making process is still ongoing in South Sudan whereas the Somaliland process is a retrospective or 'settled' case since the Somaliland constitution was adopted in

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<sup>7</sup> Fombad 2007: 32.

<sup>8</sup> See Hay 2014: 142ff; Dann and Al-Ali 2006: 426f.

<sup>9</sup> Eisenhardt and Graebner 2007: 25–32.

<sup>10</sup> A normative order can be defined as 'a body of interrelated norms, or of rules and principles' (Woodman 2011: 10).

<sup>11</sup> Local law refers to the different normative orders of South Sudan's and Somaliland's local communities. It can be understood as one of the various forms of—according to C. Geertz (1983)—local knowledge.

<sup>12</sup> The territorial modern state has become the only valid state order system. Even though the idea of the state has been attributed with different meanings, the notions of territoriality (borders), internal and external sovereignty, and the state as a body of administrative institutions seem to prevail (Schlichte 2004: 150f).

<sup>13</sup> See Tushnet 2008.

2001. Combining retrospective and real-time cases allows for mitigating 'biased data'<sup>14</sup>. One of the major distinctive features is that only South Sudan has gained international recognition. South Sudan was recognised as a sovereign state by the United Nations<sup>15</sup> only a few days after declaring its independence from the Republic of the Sudan on 9 July 2011. Somaliland self-declared its independence from Somalia in May 1991<sup>16</sup>. However, international recognition as a sovereign state has been granted neither by the United Nations, by the African Union, nor by any other supra-national structure. 'Its legal status poses an enigma as it seeks independence while the international community continues to align itself with the orthodox position, which is in support of the territorial integrity of Somalia'<sup>17</sup>. The denial of international recognition has created 'a barrier to potential foreign direct investment'<sup>18</sup> and has severe implications for Somaliland's participation in receiving international 'state-building assistance'. However, unlike the constitution-making efforts in the *de jure* sovereign oil-rich South Sudan, where there is immense international support for building both the state and the constitution, constitution making in the *de facto* independent Republic of Somaliland seems to be one of the rare cases of a locally led process.

In order to grasp the international dimension of constitution making in both cases, it is necessary to consider that this process takes place within a universe of plurality of co-existing and co-constituting normative orders<sup>19</sup> that are generated through constant (re-)negotiations, recognition, determinations and are utilised by complex actor constellations, with different sources of legitimacy<sup>20</sup>. Moreover, since normative ideas travel around the globe, their content changes constantly, but they in turn also change the institutional frames and legal cultures into which they are translated. Therefore, translation<sup>21</sup> is chosen as an analytical lens. An important part of translation is constructing a frame which can have powerful effects on the way situations are understood and on the tactics their supporters deploy. Framing goes along with transplanting efforts. Transplants are models<sup>22</sup> adapted from one local context to another, often in unexpected ways, whereby each translation is part of a 'translation chain'<sup>23</sup>. Frames are not only translated into new contexts, but they retain their underlying emphasis on certain legal notions embedded in the legal codes of the international legal system. Identifying

<sup>14</sup> Eisenhardt and Graebner 2007: 28.

<sup>15</sup> The UN General Assembly of 14 July 2011 approved the UN Security Council Resolution S/RES/1999 (2011), recognising South Sudan as the 54<sup>th</sup> African state and admitting it as 193<sup>rd</sup> Full Member to the United Nations; Ki-moon 2013.

<sup>16</sup> Resolution from Burao Elders Meeting 5 May 1991, in: APD 2008: 90.

<sup>17</sup> Osman 2013: 49.

<sup>18</sup> Ibid.: 51.

<sup>19</sup> See Schiff Berman 2012.

<sup>20</sup> Von Benda-Beckmann et al. 2009: 1–30.

<sup>21</sup> Translation can be understood as the process of adjusting the rhetoric and structure of legal interventions to local circumstances (see comprehensively Merry 2006: 265–302; Shimada 2006: 83–95; Bachmann-Medick 2012: 331–59; Behrends et al. 2014).

<sup>22</sup> A model can be understood as 'an analytical representation of particular aspects of reality created as apparatus of protocol for interventions to shape this reality for certain purposes' (see Behrends et al. 2014: 1–2).

<sup>23</sup> Ibid.; Rottenburg 2009.



'translators' and 'technologies of governance' they help to establish, their specific interests, motives, preferences and their impact allows an analysis of power relations which are understood as processes of negotiation between different frames of references among actors. Moreover, (legal) knowledge transfer seems to be highly supported by pre-defined modules, templates and taxonomies. *Translation* allows for a thick comparison<sup>24</sup>, because it does not lose sight of the idiosyncrasies of each locale under study. It allows a comparison of the way in which (inter)national legal norms are appropriated and translated into different local normative orders. In order to deal with the difficulties of comparing different contexts which are embedded in and shaped by specific local socio-political and historical dynamics as well as by global politics, a comparison must be 'based in the logic of encounter'<sup>25</sup>. Each case 'stands on its own as analytic unit'<sup>26</sup>.

Local contexts are taken as the comparative starting point from a legal plural perspective in order to trace the respective constitution-making processes. By taking a concrete perspective of the making of constitutions as an exploratory epistemological strategy, attention is drawn to what is happening at concrete negotiation tables and in negotiation arenas<sup>27</sup> where different normative doctrines, institutions and practices are re-negotiated, and social and legal hierarchies<sup>28</sup> are constituted. In order to grasp the major negotiating dynamics within respective processes, 'critical moments in the process that led to a change in the course of the negotiation[s]'<sup>29</sup> are identified. These 'turning points'<sup>30</sup> not only set new negotiation patterns in motion, but can also unveil the actual 'ownership'<sup>31</sup>. It is therefore necessary to identify 'a clear and self-evident change from earlier events or patterns in the form of a decision taken by one or all parties'<sup>32</sup> which leads to an alteration in direction taken by the negotiation process.

The two case studies will be explored through the collected empirical data with their own respective dynamics. The aim is to shed new light on the constitution-making processes at stake based on fieldworks in both countries<sup>33</sup> as well as qualitative content analysis of written materials such as official legal documents, protocols, records and local newspaper, academic articles, etc. Oral interviews have been conducted for the same purpose with numerous (institutional) actors who

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<sup>24</sup> Following C. Geertz's 'thick description'.

<sup>25</sup> Freeman and Mangez 2013: 204.

<sup>26</sup> Eisenhardt and Graebner 2007: 25.

<sup>27</sup> A negotiation table can be defined as 'a formalized setting where contending social groups decide upon key aspects of statehood over a given period of time', governed by particular conventions and formalities that entail mutual recognition among the participants. A negotiation arena is non-formalized settings of negotiation and 'represents the broader political space in which relations of power and authority are vested' (Hagmann and Péclard 2010: 551); as such, options of action are not bound to certain types of behaviour, and may include both non-violent and violent practices (Kapferer and Taylor 2012: 4; *ibid.* 2005: x).

<sup>28</sup> Von Benda-Beckmann 2014: 4.

<sup>29</sup> Crump and Druckman 2016: 6.

<sup>30</sup> *Ibid.*

<sup>31</sup> The catch-all concept of 'intellectual' ownership is widely understood as 'the extent to which domestic actors control both the design and implication of political processes' (Donais 2009: 5).

<sup>32</sup> Crump and Druckman 2016: 7.

<sup>33</sup> South Sudan (05/2011, 04–06/2013, 04–06/2015); Somaliland (10–11/2015).

narrate their respective experiences of constitution making from different perspectives as well as participant observations in order to achieve a 'thick translation'<sup>34</sup> or thick comparison. This method 'entail[s] a more or less explicit acknowledgement that what can be learned from one case is not necessarily comparable with what can be learned from another', even though 'comparison zones' in the sense of 'open space' or 'a white page, an area or arena of reflection' may be developed in order to construct a 'post-comparative perspective'<sup>35</sup>.

This paper will therefore address the following questions:

- How are international 'models' appropriated, adapted and transformed by the actors involved?
- What role does the process itself play with regard to exclusion and inclusion dynamics at different stages of constitution making?
- To what extent does 'external' involvement contribute to ideas of cohesion, certainty and stabilised governance?

This paper basically reveals that strong external interventions in the constitution-making process is not a necessary condition and instead is of only limited use for the emergence of a local legitimate political order. As will be demonstrated, translation dynamics are basically controlled by local political dynamics. Accordingly, attempts to produce a constitution out of pre-defined international concepts, modules and templates are deceptive and the translation results are often contrary to intended ideas of Rule of Law. In light of local translation processes, the de facto influence of well-intended international interventions seems to be rather limited and the chosen intervention methods counter-productive.

## II The Framing: Constitution making as corner stone of Rule of Law promotion

The *Rule of Law* seems to have not only become 'the dominant paradigm for state governance in the international arena'<sup>36</sup>, but also 'the *Grundnorm* of a new constitutionalism'<sup>37</sup>. It has become the 'basic grammar of constitutionalism'<sup>38</sup>, structuring the politico-legal discourses and the 'use of concepts like people, self-government, citizen, rights, equality, nation, and popular sovereignty'.<sup>39</sup>

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<sup>34</sup> Hermans 2003: 380–9; Appiah 1993: 808–19.

<sup>35</sup> Freeman and Mangez 2013: 202.

<sup>36</sup> Grenfell 2013.

<sup>37</sup> May 2014a: 63–76.

<sup>38</sup> Key elements of the constitutionalism grammar have become amongst others the recognition of civil, political and economic rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of the amendment of the constitution, and institutions that support democracy (Fombad 2011: 1014f; Akiba 2004: 6).

<sup>39</sup> Maldonado 2012: 1.

The *Rule of Law* is a packed idea that produces a joint belief and persuades and defines strategies of collective action<sup>40</sup>. The framing is reaffirmed, e.g. in the UN Resolution on *Rule of Law*: 'We are convinced that good governance at the international level is fundamental for strengthening the rule of law'.<sup>41</sup> Hence, it 'socialise[s] elites and legislators into the Rule of Law mind-set'<sup>42</sup> whereby enormous normative transfers take place<sup>43</sup>: including constitutions and institutions. Due to many unintended implementation effects in practice, the huge gap between RoL promises and effects has led to a certain self-reflexivity by international actors. The 2004 *UN Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict* already states:

[...] too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity [...] We must learn better how to respect and support local ownership, local leadership.<sup>44</sup>

A sub-frame is the catch-all concept of 'intellectual' ownership which has emerged within the debate on development assistance since the 1990s: 'The common people in "post conflict" or "war-torn"<sup>45</sup> societies are [...] expected to participate, to be consulted and have their say on the formulation of new constitutional frameworks [...] in order to be successfully implemented'.<sup>46</sup> The contested concept of 'local ownership'<sup>47</sup> includes both, in the narrow sense, the national government and its institutions and, in the broader sense, a form of popular participation.<sup>48</sup> There has also been a slight observable shift in recent years in the international conceptualisation of RoL: consideration has been given to legal pluralism dynamics<sup>49</sup>. An expression of more participatory constitution making is that 'stakeholders' are not limited to state actors but increasingly include so called non-state actors. In addition to the recognition of normative diversity, most RoL narratives are connected through the belief that RoL has universal qualities that makes it stand apart 'as a non-ideological, even technical solution'<sup>50</sup>. Critical comments point out that even though 'ownership' has become *sine qua non* for international involvement<sup>51</sup>, it has not been translated into a 'de facto self-

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<sup>40</sup> Merry 2006.

<sup>41</sup> UN Resolution on Rule of Law at the National and International Levels 2012, A/RES/68/116.

<sup>42</sup> May 2014a: 75.

<sup>43</sup> See Rajagopal 2008: 1347f; Kendall 2013: 9f.

<sup>44</sup> S/2004/616.

<sup>45</sup> Even though the phrases 'post-conflict' and 'war-torn' are often used interchangeably, in this paper the latter is used to emphasise the emerging character of the 'states' under study where violent and non-violent modes of re-negotiation of statehood are ongoing.

<sup>46</sup> Sannerholm 2012: 124.

<sup>47</sup> See comprehensively Bargaúes-Pedreny 2015.

<sup>48</sup> Sannerholm 2012: 121–2.

<sup>49</sup> Grenfell 2013: 7.

<sup>50</sup> Carothers 1998: 99; Rajagopal 2008.

<sup>51</sup> See also Seidel 2015.

determination or self-government'<sup>52</sup> due to tensions between international regulations and the concept.

Moreover, not only does the constant affirmation of Rule of Law seem to be a key governance technology to cultivate the *Grundnorm*, but other powerful tools are required to legitimise and sustain the paradigm towards the ideal of liberal democracy and capitalist market logic: taxonomies of social phenomena. These globally circulating knowledge technologies are supposed to support the production of 'legitimacy' and funding possibilities. They are 'used to quantify, compare, and rank virtually any complex field of human affairs'<sup>53</sup>. However, even though they are presented as facts, indicators 'are not neutral representations, but novel epistemic objects of regulation, domination, experimentation'.<sup>54</sup> These hegemonic positions are not only hidden in numbers and statistics, but:

[...] all sorts of words [have] to be invented to express the gap between actual practice and the ideal. Terms, such as [...] weak states, [imply] that the way things really work are somehow exogenous to the normative model [...]. For non-European states, the danger is that the one measure, the ideal-type state drawn from European experience, creates a hierarchy in which those farthest from the ideal-type are lowest in the hierarchy.<sup>55</sup>

As South Sudan and Somalia are farthest from the European ideal-type, accounts such as the 'Fragile States Index 2016' have classified them as the two worst performers. South Sudan is leading the 'extremely fragile' states<sup>56</sup> after presupposing fixed arrangements of statehood such as a collective identity, an agreed territory and a monopoly of power. These are, in fact, not universally given and can therefore not be presupposed, certainly not in emerging South Sudan. Moreover, since Somaliland is internationally perceived as a sub-national entity of Somalia, it is not part of the ranking system, but is reflected as part of the second worst performer, Somalia. Similarly, according to the regional 'Ibrahim Index of African Governance: *Rule of Law* 2015', Somalia and South Sudan are at the top of the 'worst performers'<sup>57</sup>, based on the ideal-typical RoL-categories. Other taxonomies such as the 'Rule of Law Index' of *The World Justice Project* have excluded both countries due to lack of data.<sup>58</sup> Thus, these taxonomies indicate that the global templates are fundamentally mis-conceptualised and often have not much in common with the realities on the ground.

This study takes a closer look at the 'realities' through the lens of constitution making, particularly as the application of the above taxonomies is cultivated through a 'professionalization of global politics and the deployments of

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<sup>52</sup> Bargués-Pedreny 2015: 20.

<sup>53</sup> Rottenburg and Merry 2015.

<sup>54</sup> Ibid.

<sup>55</sup> Migdal and Schlichte 2005: 11.

<sup>56</sup> See Fund for Peace and Foreign Policy 2016.

<sup>57</sup> Mo Ibrahim Foundation 2015.

<sup>58</sup> See World Justice Project 2015.

programmes'<sup>59</sup> through which specific notions of law are promoted. Competing international RoL actors promote their tools as a solution to problems of order and are eager to support war-torn countries' transition to a 'modern' democratic state.

A cornerstone of the promotion of rule of law appears to be the spreading of a specific scheme of constitutionalism<sup>60</sup>. When taking a closer look at constitution making prevalent in Africa since the 1990s, the proclaimed so called 'third wave of constitutionalism'<sup>61</sup> seems to have opened up political space for new experimentation<sup>62</sup> under the banner of 'democratic development'. The endeavours seem to follow the problematic logic that the 'adoption of the appropriate constitution is *sine qua non* [not only] for development,'<sup>63</sup> but also for 'credibility with external donors.'<sup>64</sup> This belief inherently narrows down constitutional pluralism since it does not take sufficient account of the legal pluralist realities, despite its claim of 'accommodating diversity'.

External constitution-making assistance is primarily provided to governmental actors in the form of technical support and legal advisory services by various experts<sup>65</sup>. National actors are caught between competing international participants and often in a dilemma when choosing between a multitude of well-meaning offers.<sup>66</sup> The services offered come with a range of international benchmarks and tool-boxed conflict-resolution mechanisms<sup>67</sup>, interwoven with multi-layered premises and interests. Recent experiences show that the more severely constitution making in war-torn settings relies on international funding, the greater the inherent tensions between the different agendas and interests of external actors and objectives of national actors, accompanied by a varying mix of normative orders and political imperatives which have severe processual and substantive implications<sup>68</sup>. Consequently, the 'clients attempt to entrench offered RoL schemes into already pre-modelled constitutional frames in the hope of shoring up international legitimacy but also in the hope [that] over time [RoL] becomes fused with local legal cultures'<sup>69</sup>. Those model constitutional frameworks create 'procedural objectivities'<sup>70</sup>. However, the 'production' of constitutions poses *de facto* severe challenges, e.g. 'the interaction among the plurality of factors of production (political history, legal plural setting), processes (legitimacy, legality), quality of products (implementation), and marketing (coordination with inter-/transnational law, local law) as well as customers' satisfaction ("good practice of democracy")'.<sup>71</sup> Empirical evidence has shown that the offered assistance, the

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<sup>59</sup> May 2014a: 75.

<sup>60</sup> Frankenberg 2013: 1; Toniatti 2013.

<sup>61</sup> Akiba 2004: 9.

<sup>62</sup> Ibid.: 9.

<sup>63</sup> Adelman 1998: 78.

<sup>64</sup> Fombad 2007: 3.

<sup>65</sup> See Kendall 2013: 1–15.

<sup>66</sup> IDEA 2011: 15.

<sup>67</sup> Eriksson and Kostić 2013: 6; Sannerholm 2012: 103f; Humphreys 2010: 7ff; Kendall 2013: 9f.

<sup>68</sup> Dann and Al-Ali 2006.

<sup>69</sup> Grenfell 2013: 13.

<sup>70</sup> Rottenburg 2009: 140.

<sup>71</sup> Toniatti 2013.

production mode as well as the undue pressure not only fail to achieve what they are promise, they create instead what they want to avoid: 'a poor governance framework; weakening human rights protections, entrenching societal divisions; delegitimizing the new constitution'<sup>72</sup>.

### III Rule of Law in Translation: Constitution making in emerging South Sudan

When South Sudan declared its independence from the *Republic of Sudan* on 9 July 2011, President Salva Kiir Mayardit held up an oversized reddish book as a symbol of the new state: the *Transitional Constitution of the Republic of South Sudan* (TCRSS)<sup>73</sup>. This book symbolises independence and currently serves as the pre-modelled normative frame of the new state. The makings of both the TCRSS (which is itself based on the pre-modelled *Comprehensive Peace Agreement* (CPA), specifically the *Interim Constitution of Southern Sudan, 2005*)<sup>74</sup> and the upcoming 'permanent' constitution show that many actors have been excluded from the decision-making process. The constitution-making negotiations seem primarily to be conducted by the ruling national elites and international actors<sup>75</sup>.

#### 1 Making the Transitional Constitution

The adoption of the TCRSS by the South Sudan parliament was pushed through only three days before the declaration of independence in order to ensure that this CPA-pre-modelled document could serve as a preliminary normative frame for the emerging state. This happened despite the many unsolved basic issues such as the system of governance, distribution of state functions, federal and state powers, etc. During a final seven-hour legislative debate at the negotiation table, many members of parliament (MPs) complained about the haste with which the draft was negotiated behind closed doors. The TCRSS draft was even referred to polemically as the 'SPLM constitution'.<sup>76</sup> Concerned MPs were reassured that full participation in and discussion of all contentious issues would be constitutionally guaranteed by the *National Constitutional Review Commission* (NCRC) and subsequently by the

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<sup>72</sup> Ludsin 2011: 310.

<sup>73</sup> The TCRSS is based on the Interim National Constitution for the Republic of Sudan 2005 whose substance was by and large predetermined through the Comprehensive Peace Agreement (see Dann and Al-Ali 2006: 447–9).

<sup>74</sup> The CPA of 2005 sought to end the decades-long civil war. The CPA can be regarded as a fundamental 'turning point' within the negotiations between the Sudanese government and the Sudan People's Liberation Army (SPLA) and paved not only the way for the 'declaration of independence' but the attached IC can be seen as the starting point for South Sudanese constitution making. This paper's scope is limited to the post-2011 constitution making (see Johnson 2011; Wassara 2009; Grawert 2010).

<sup>75</sup> See also Seidel 2015.

<sup>76</sup> Southern Sudan Legislative Assembly (2001), The Transitional Constitution of South Sudan. Ordinary Sitting no. 25, Second Session on 6 July 2011, Juba (recording provided by NLA on 02.05.2013).

*National Constitutional Conference* (NCC).<sup>77</sup> The TCRSS outlines the process of how to achieve the proclaimed goal of 'providing emerging South Sudan with a people driven constitution'.<sup>78</sup>

The making of the TCRSS had been controlled by a *Technical Committee to Review the Interim Constitution of Southern Sudan*. The participants at this negotiation table were appointed by the president and comprised of a two third majority of the ruling party, *Sudan People's Liberation Movement* (SPLM).<sup>79</sup> Accordingly, the presidentially hand-picked committee quickly reviewed the interim arrangements and—behind closed doors—granted the president hyper-powers to deal with war-torn political and military fragmentation. The remaining third of the committee members perceived their participation as being reduced to a 'rubber stamp' function.<sup>80</sup> The adoption of the TCRSS can be seen as a crucial 'turning point' in the negotiations on a South Sudanese constitution since numerous contested issues already inscribed here not only postpone further negotiation to the 'permanent' constitution, but the president was granted the authority to use the TCRSS as a power instrument handed over by the parliament and made by the Technical Committee. This has limited the space for negotiations on the fundamental choices regarding the political design of South Sudan.

## 2 *Making a 'Permanent' Constitution: The National Constitutional Review Commission*

Shortly after the adoption of the TCRSS, another negotiation table was set-up by presidential decrees<sup>81</sup>: the 54-members *National Constitutional Review Commission* (NCRC) was mandated with drafting a 'permanent' constitution, initially within two years<sup>82</sup>. The *South Sudan Civil Society Alliance*, an umbrella organisation of more than two hundred of South Sudan's civil society organisations, successfully fought for at least a voice in the NCRC.<sup>83</sup> A closer look at the composition of the NCRC, however, reveals that forty-three of its members represent political parties of which twenty-six were appointed by the SPLM.<sup>84</sup> As was the case for the TCRSS drafting, the ruling political party and its alliances carved out a privileged position for themselves in the negotiation of the political leeway necessary to assert significant control over the constitution making. Being relegated to a second tier of

<sup>77</sup> A National Constitutional Conference is to deliberate on the NCRC draft. Subsequently, 'the President shall deliberate and adopt' (Art. 203 TCRSS).

<sup>78</sup> Art. 202–3 TCRSS.

<sup>79</sup> Seidel and Moritz 2011: 92.

<sup>80</sup> Interview with Gabriel Nehemiah Aciek, Juba University, Juba, 14.04.2013.

<sup>81</sup> Government of South Sudan (GoSS): Presidential Decrees: RSS/PD/J/02/2012, 21.01.2011; RSS/PD/03/2012, 09.01.2012; RSS/PD/J/09/2012, 29.02.2012; RSS/PD/J/36/2012, 28.05.2012.

<sup>82</sup> The intention was to complete the constitution-making process by 2015. In light of the current political and military re-negotiations in South Sudan the making of the 'permanent' constitution has now been extended to 2018.

<sup>83</sup> Presidential Decree RSS/PD/J/36/2012, 28.05.2012; Interview with Henry Swaka, Juba, 10.04.2013; Tier 2013.

<sup>84</sup> Presidential Decree RSS/PD/J/03/2012, 09.01.2012.

negotiations, civil society actors formed various citizens' constitution-making fora<sup>85</sup>. They hoped that the actors at the official NCRC negotiation table would consider and integrate the outcomes and suggestions of the various CSO fora into the constitution-making process<sup>86</sup>. However, the influence of the few appointed NCRC members representing civil society and serving as voices for the people on the ground seems instead to have again been reduced to a 'rubber stamp', with their signatures becoming a formality in the face of the majority voting system.<sup>87</sup> This situation only serves to increase tensions and potential conflicts, as many actors feel excluded despite all the efforts made to win a place at the negotiation table.<sup>88</sup>

Over the course of last three years several conversations were held with the former head of the NCRC, the late Akolda M. Tier, to learn more about how the NCRC is negotiating a 'supreme law of the land' among the plurality of actors and how the institutional actors deal with the offered international 'technical assistance'. When speaking with NCRC-chairperson during fieldwork in May 2015, his views regarding the production of a constitution had fundamentally changed: in 2013, Akolda emphasised that 'a constitution is an agreement between political parties' to be drafted by legal experts with support of international expertise. It is a technocratic endeavour. Involving the common people at this early production stage would be time consuming and will cause confusion. There was a predominant notion of 'we draft for the people'<sup>89</sup>. However, in 2015, the chairperson of the NCRC admitted: 'constitution making is not a switch on switch off operation'<sup>90</sup>, it is not a 'project'. Moreover, he seemed to be upset with a 'market place' situation in his office, where multiple international actors advertised their products, recipes and toolboxes<sup>91</sup>.

### 3 *The International Actors and their Constitution-Making Toolbox*

In the following, this international toolbox is opened and attention turned as to how the various technologies of governance produce normativity and what effects those technologies have in light of translation processes of the circulating models. In an inversion of proclaimed ideas of 'local ownership', the international rule of law frames seem to regulate South Sudan's constitution making in a way that reduces the chances of integrating the various ideas on statehood from the segmented society. The normative frames rather guarantee that 'donors' have a

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<sup>85</sup> Anticipating that the actual 'permanent' constitution process will be conducted in a rather exclusive manner similar to how it had been conducted during the TCRSS drafting, civil society actors are prepared partially to fill the gap by promoting a comprehensive dialogue. For example, they had already collected views in all former 10 states for inclusion in the constitution in 2012–13. About 1,200 citizens were consulted via focus groups—traditional authorities, women's groups, youth groups, civil society, state assemblies, religious groups, MPs and local government actors. The findings were subsequently passed on to the NCRC.

<sup>86</sup> Interview with Marekaje Lorna, Juba, 04.04.2013; 01.05.2013, 15.05.2015; Peter Gai Manyoun, Juba, 11.04.2013.

<sup>87</sup> NCRC 2012.

<sup>88</sup> See comprehensively Seidel and Sureau 2015.

<sup>89</sup> Conversations with Akolda Ma'an Tier, NCRC, Juba, 03.04.2013; 03.05.2015.

<sup>90</sup> NCRC 2014.

<sup>91</sup> Conversation with Akolda Ma'an Tier, NCRC, Juba, 26.05.2015.



dominant influence in agenda setting and on designing 'projects'. Even though local actors are forced to negotiate within the highly contested international normative frames, it will be shown, how dominant local actors utilise the internationalised constitution making as well as the pre-defined reference frame in the Transitional Constitution 2011 to secure their own interests and positions.

South Sudan's internationalised 'post-conflict' reconstruction efforts are part of the latest constitutional experimentation mentioned above. In order to make the experimentation successful, i.e. to ensure that certain normative ideas become the driving force for legal interventions, they need to be framed. Accordingly, the website of the United Nations Development Programme (UNDP) branch for South Sudan echoes the *Grundnorm*:

The rule of law is the essential framework for security, economic growth and the provision of social services in South Sudan. It provides mechanisms for the peaceful resolution of conflicts, the certainty that allows the private sector to develop [...], and access to justice that ensures respect for human rights [...].<sup>92</sup>

The constant affirmation of the RoL-frame seems to be a key governance technology to cultivate the *Grundnorm*<sup>93</sup>, and it seems to be legitimised and sustained by the powerful tool of taxonomies supported through indices. As mentioned above, in an attempt to relate the emerging state to the other 193 states in the 'community of nations', the introduction of the model state of South Sudan was accompanied right from the start by reference to the commonly accepted set of global benchmarks: the indicators of statehood and rule of law. South Sudan heads up the list of 'very high alert' states.<sup>94</sup> Those classifications are based on problematic premises: they 'presuppose a collective identity, i.e. a fictitious entity comprising the entire "constitutive people", for whom the state has failed'.<sup>95</sup> The on-going violent and non-violent negotiations over statehood at different societal levels demonstrated that, to date, there has been no regional and certainly no national consensus on the mode of either statehood or of dealing with the many interests and claims.<sup>96</sup>

When taking a closer look at the dominant international actors supporting the constitution-making process, it is clear that the provision of expertise ranges from individual and groupings of states, (supra-)regional institutions, non-local NGOs, commercial actors, research institutions and think tanks<sup>97</sup>. Not only 'repeat players' such as the *United Nations* (UN), *United States Agency for International Development* (USAID), *Department for International Development* (DFID), *International Development Law Organisation* (IDLO), *SwissPeace*, but also pro-boni law firms, e.g. *Public International Law & Policy Group* (PILPG) offer programmes, guidelines,

<sup>92</sup> See UNDP, <http://www.undp.org/content/dam/southsudan/library/Fact%20Sheets/UNDP-SS-Rule-of-law-flyer.pdf>.

<sup>93</sup> May 2014a.

<sup>94</sup> See Fragile States Index 2016.

<sup>95</sup> Schlee cit. in Fenzel 2014: 23.

<sup>96</sup> See comprehensively Seidel and Sureau 2015.

<sup>97</sup> Turner 2015: 397.

'good/best practices'. In order to limit competition among the international actors, some actors, specifically IDLO, UNMISS and PILPG managed to be explicitly named in a presidential decree.<sup>98</sup> Moreover, IDLO's legal experts obtained a seat at the NCRC negotiation table and provided comprehensive assistance, as an IDLO 'Briefing Note'<sup>99</sup> demonstrates which brings the question of who owns the process on the fore.

International actors use certain IT technologies as well as security technologies to provide their services. They offer access to legal databases and thereby standardise specific schemes of constitutionalism. Moreover, they promise to create 'online public submission forms' to gather public input. This tool belongs to the 'best practices' tested, for instance, during South Africa's and Kenia's constitution making. However, the applicability of those tools seems to be questionable in light of the very marginal internet access in South Sudan, even in the major cities.

This demonstrates that South Sudan's constitution making is an internationally designed product. However, the ongoing violent and non-violent re-negotiations demonstrate in no uncertain terms that neither the production of the pre-defined transitional constitutional arrangements of 2005 (Interim Constitution) and 2011 (TCRSS), nor the efforts towards a 'permanent' constitution could establish a consolidated state actors' legitimacy and the identity of the emerging state. Nevertheless, few dominant local political actors have already utilised the international tools. Thereby the TCRSS has become a perfect power instrument with unpredictable effects on the governmental arrangement. It shows severe unintended consequences that international 'tools' have co-created. For example, a constitutional amendment of 2015 not only extended the mandate of the *National Constitutional Review Commission* for another three years, but also the tenure of the president and the parliament<sup>100</sup>. The quickly drafted TCRSS, which is based on modules taken from the international constitution-making toolboxes, allowed predetermination of its numerous fundamental but unanswered questions regarding e.g. governmental structure or division of powers. The local translation dynamics become visible in the president's excessive powers as enshrined in the constitution. Since 2012 President Salva Kiir has been using his 'hyper-powers' for his benefit, a consequence of the 'turning point' mentioned above. The president dismissed his Vice-President Riek Machar, his entire cabinet, and eight out of ten

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<sup>98</sup> The National Constitution Review Commission, is '[...] to invite experts whenever required, to assist it in its work' and 'the secretariat may seek technical assistance from international partner organizations such as IDLO [International Development Law Organization], PILPG [Public International Law & Policy Group], UNMISS [United Nations Mission in the Republic of South Sudan] or any other organization as necessary', see Art. 14 (7) Presidential Decree RSS/PD/J/02/2012, 21.01.2011.

<sup>99</sup> The assistance comprised, for instance: to prepare the steps to be taken in the constitution making; to draft the decree to establish the NCRC; to prepare memo to the MoJ to give the president his strategy for the constitution process; to create concept notes on issues involving CSOs, public participation; to prepare talking points for the President's speech at swearing in NCRC at the request of the President's office; to provide support to the development of Rules and Procedures for the NCRC; to develop the NCRC Action Plan, etc.

<sup>100</sup> Government of South Sudan (GoSS) 2015.

state governors and appointed 'caretakers'<sup>101</sup>, setting in motion severe political and military re-negotiations<sup>102</sup> within the political negotiation arena.

Already during the making of the Transitional Constitution the process was controlled by the *Technical Constitutional Committee* (TCC) mentioned above as appointed by the President at the beginning of 2011. About two-thirds of its members belonged to ruling party SPLM. This two-thirds majority was necessary to generate consensus according to the committee's internal rules.<sup>103</sup> These rules are taken from the international toolbox. The internal rules of the NCRC, which seem to be the amended TCC internal rules, follow the majority voting system as well.<sup>104</sup>

The space for negotiating the production of the constitution is also narrowed by 'project law'<sup>105</sup>. To illustrate the challenges of those techniques, it is necessary to return to the 'permanent constitution' project.

As far as the design of the project is concerned, it follows a four-stage constitution-making process according to international standardised procedures. The supporting tools, the 2009 guidance note on *United Nations assistance to constitution-making processes* and an attached template of the proposed process reflects the 'standard'. The different negotiation tables are the NCRC, followed by a *National Constitutional Conference* (NCC)<sup>106</sup> and the *National Legislative Assembly* (NLA) and the President. There is an inherent contradiction in the process proposed: the project design is an impediment to a citizens' driven constitution 'since governmental actors debate rather among themselves not only in the NCRC'<sup>107</sup>. Any input from the citizens will occur during the NCC, the results will be decided afterwards in parliament by SPLM dominated politicians.

Moreover, the 'timeline' has become an obstacle as well. The envisioned time frame for the 'permanent' constitution project of 2015 was obviously over-

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<sup>101</sup> See Seidel and Sureau 2015.

<sup>102</sup> The major violent conflict was spreading at the end of 2013, which has caused more 10,000s lives and two million have been displaced. This time the conflict has been among South Sudanese political and military actors themselves. It began as a political power struggle within the ruling party SPLM (civil wing of the Army) and disputes over the party's constitution-making. These disagreements escalated in December 2013 and set in motion a conflict spiral in which the President Salva Kiir Mayardit and his former Vice-President Riek Machar, which the President Salva Kiir had removed from his position, became the main political and military opponents. But they are not the only protagonists in light of the fragmented military forces and authority structures. Since the beginning of 2014 regional/international actors have attempted to mediate and facilitate a 'peace process' in the neighbouring countries of South Sudan. Almost all efforts have failed to implement the formation of a so called 'Transitional Government of National Unity' agreed by the warring factions in 2015.

<sup>103</sup> Art. 10 (1) NCRC Internal Rules of Procedure 2012; Technical Committee 2011.

<sup>104</sup> NCRC 2012.

<sup>105</sup> Project laws are normative categories, hidden in standardised planning concepts, management techniques or general models at both project planning and implementing levels which aim for social change (see Weilenmann 2009; von Benda-Beckmann et al. 2009).

<sup>106</sup> The NCC will comprise delegates representing political parties, civil society organisations, women's organisations, youth organisations, faith-based organisations, people with special needs, traditional leaders, etc. (Art. 203 (1) TRCSS).

<sup>107</sup> Interview with Edmond Yakani, Juba, 10.06.2015.

ambitious in light of two extension periods which have already taken the project to 2018.<sup>108</sup>

A closer examination of the structure and activities of the NCRC, based on the 2009 UN guidance note, reveals that 'procedural objectivities'<sup>109</sup> are produced by the international partners through activity plans on how to produce a constitution. Within the constitution-making project, such plans and schedules determine what actions are viewed as necessary to achieve the goals, as well as the conditions, timing, and personnel involved. The NCRC Action Plan 2013/14 followed the UN guidance note and the attached example of a process, in terms of its general structure, activities, and timeline. Three components are involved in the sequence: 1) civic education and public consultation proceedings; 2) constitutional review proceedings; 3) NCRC deliverables. Specific project management language is used as well, making particular use of procedural verbs, such as organise, execute, consult, recruit, create, and produce. This language reflects a linear process and objective procedures.

Furthermore, the international concepts of 'local ownership' are ingrained in the plan. Regarding 'national ownership', 'responsible actors' (the NCRC) and 'implementing actors' (international partners) are determined. However, activities relating to technical assistance and to special expertise are constructed the other way round; for instance, international actors such as IDLO and IFES (*International Foundation for Electoral Systems*) are responsible for creating public submission databases, providing thematic research conducted by sub-committees, recruiting thematic experts for research on South Sudan, producing comparative studies, recruiting experts on drafting constitutions, etc. Within the context of this division of labour, the question arises as to who actually owns the process.

As far as the 'popular ownership' mentioned in the 2009 UN guidance note and in the TCRSS<sup>110</sup> is concerned, the NCRC Activity Plan foresaw components such as 'civic education' and 'public consultation campaigns of about six months'. Following the Activity Plan schedule, the NCRC launched a civic education programme to involve the public in the ten states of South Sudan in the constitution-making process in July 2013. Due to the commission's continuous lack of key resources, such as financial means and appropriate locations, and 'due to a lack of political will' as informants critically remarked<sup>111</sup>, the process floundered and the campaign was doomed to fail. Moreover, the December 2013 crisis 'has increased such lack of funding, [has] limited the availability of technical support and has restricted the NCRC's ability to continue implementing its civic education and public participation campaign due to security concerns'.<sup>112</sup> The events of December 2013 can be regarded as another turning point in the constitution-making process. The commission was forced to stop the half-hearted civic education efforts as the major political actors turned to military re-negotiations. The violent political dynamics

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<sup>108</sup> TCRSS (Amendment Act 2013); TCRSS (Amendment Act 2015).

<sup>109</sup> Rottenburg 2009: 140.

<sup>110</sup> 'The Constitution derives its authority from the will of the people', Art. 3 (1) TCRSS.

<sup>111</sup> Interview with G. N. Aciek, Juba University, Juba, 14.04.2013.

<sup>112</sup> IDEA 2014.

since 2013 have implications for constitution making since international actors have currently stopped supporting the process.

#### 4 *A Constitution of 'Zol Meskin' [common people] in Light of the International Toolboxes?*

It remains to be seen what impact the current political re-negotiations are having on the continuation of the constitution making. It is still an open question whether the participatory civic and public education will go beyond a mere awareness campaign on the official constitution making being conducted by the (inter)national elites.<sup>113</sup> A general observation is the existence of problematic tensions between the 'public ownership' and the application of project management tools since the timetable was not sufficiently flexible to allow ideas which arise during the public consultations to be introduced and re-evaluated. As far as drafting of a 'permanent' constitution within the context of a highly segmented South Sudan is concerned, there is an obvious dilemma: on the one hand, the absence of a 'nation' or national ideas, and the predetermination of those ideas in the constitution. On the other hand, even though the modes of statehood are still under negotiation, the technical assistance and toolboxes provided by international actors regulate the constitution-making process in such a way that it reduces the chances of substantially assessing and integrating the interests of the different parts of the segmented society by simultaneously proclaiming ideas of national and popular ownership. The governmental political actors involved are prone to apply and redefine constitutional schemes and utilise guidelines according to their own needs. They effectively adapt their normative frameworks to international ones, or at least pretend to. As civil society actors have been relegated to a second tier of negotiations, they have established their own negotiation tables as they also wish to participate in the official state-making process.

The political and, particularly since the end of 2013, the military re-negotiations reveal that the building blocks of a constitution are contested. South Sudanese actors need to reflect on the internal socio-political dynamics, the root causes of the 'crisis', and to negotiate on the fundamental issues to be written into the constitution.

The so far 'unsuccessfully' conducted constitution-making process and the military-political re-negotiations seem to offer an opportunity for critical reflection on the constitution-making endeavour. Unless the process of drafting a constitution is radically rethought, the legitimacy of a constitution produced in this way would appear to be in jeopardy.

The late NCRC chairperson emphasised in May 2015 the significance of civic engagement and questioned the chosen constitution-making design, which does not seem to fulfil the declared idea of a 'peoples-driven' constitution.<sup>114</sup> In light of the proceedings which have not been conducted very 'successfully' so far, he wrote to the parliament:

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<sup>113</sup> See comprehensively Seidel and Sureau 2015.

<sup>114</sup> Conversation with Akolda Ma'an Tier, NCRC, Juba, 14.05.2015.

The constitutional making process could be a real basis and catalyst for a durable peace in the country; [a]cknowledging the need for the people of South Sudan to be given the opportunity in determining their socio-economic and political destiny through nationwide civic education, we strongly recommend that the mandate of the commission be extended for a period not less than three years subject for review when a permanent peace is realised in the country.<sup>115</sup>

In the same vein, the latest *Agreement on the Resolution of the Conflict in the Republic of South Sudan* (ARCRSS) which was negotiated and signed by the warring factions in August 2015 under pressure from the *East African Community* (EAC), the *Intergovernmental Authority on Development* (IGAD) and the international community modified their previous approach to constitution making. In the amended roadmap, the guiding principles are expected to be local ownership and a comprehensive popular participation.<sup>116</sup>

The constitution-making process, which has been extended to 2018, seems to be a first step towards being able to reflect the will of the people and to promote the idea of popular ownership. Maybe then, the plea of South Sudanese civil society actors promoting 'The Constitution of *Zol Meskin*' (Juba Arabic for 'common person') can become reality.

#### IV Local Translations Without the International 'Industry': Constitution making in Somaliland

Somaliland's<sup>117</sup> constitution-making experience, on the other hand, shows another picture. When Somaliland self-declared its independence on 18 May 1991, no reddish book was held up as symbol of the state, no government was in place, and no international actors with their toolboxes on how to produce a constitution were present. As will be shown, the *Constitution of the Republic of Somaliland 2001* is not a product of the internationalised constitution-making 'industry'. Since Somaliland is *de jure* perceived as part of the *Federal Republic of Somalia*, the self-declared *Republic of Somaliland* is neither part of the global experimentation field nor of any global taxonomy<sup>118</sup>. According to Mohamed Farah Hersi:

They [international actors] don't want to draft a constitution which is at the end of the day not compatible to the constitution of Somalia. A reason why the international community was more or less reluctant to support the constitution making was that they don't know how the government system in Somaliland looks like as well as the

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<sup>115</sup> NCRC 2015.

<sup>116</sup> See Ch. VI ARCRSS.

<sup>117</sup> Internationally not recognised as a sovereign state, Somaliland is only regarded as an autonomous region of Somalia since 1991.

<sup>118</sup> For the 'failed state debate' see comprehensively Hagmann and Hoehne 2009: 42–57.

Somaliland's constitution-making process is violating the territorial integrity of Somalia.<sup>119</sup>

Consequently, Somaliland's constitution making has been regarded as 'an instance of endogamous state-building' and had taken place 'with extremely modest [international] technical and financial assistance'<sup>120</sup>. This self-constructed rather endogamous process as analysed here will demonstrate that 'donors have not been able "to set the agenda" in as dominant a fashion as elsewhere'<sup>121</sup>. Furthermore, the agreement on the constitution 'is a product of very complex negotiations between the executive and legislative branches of government, with limited participation and scrutiny'<sup>122</sup>. Studies have shown that '[s]ince 1991, Somaliland has been able to re-build a consensual system rooted in its own culture by combining imported institutions with informal notions of governance, [...] an attempt to blend modern state institutions with its own cultural values'<sup>123</sup>. Even though this approach has been considered as 'successful'<sup>124</sup>, it also presents challenges of a 'locally' led process in light of exclusion and inclusion dynamics, as will be shown. According to the Somaliland government's own description of itself,

[...] using indigenous peace-making procedures, the various Somaliland communities held a considerable number of local meetings and national conferences to re-establish the peace between the different communities and lay the foundations for local security and governance, in tandem with state building and national governance.<sup>125</sup>

The establishment of negotiation tables for extended debates between the very fragmented political authorities were the predominant 'indigenous' peace- and state-making mechanisms or technologies within the political settlement. No less than '39 meetings and conferences took place at different scales between 1990 and 1997 to restore the community relations after war, to establish a security regime, to establish local and national governance'<sup>126</sup> and to agree on a constitution as the consensual foundation of the emerging state. Moreover, the establishment of *ad hoc* committees was the main tool used to put long-term meetings in place<sup>127</sup>. It is possible to identify precarious moments that occurred during constitution making at the many negotiation tables that had been established during the process and these reflect the changes in the course of the negotiations which lasted almost a decade. This paper will focus on four negotiation tables: three conferences at the national level (1991, 1993, 1997) and the popular referendum

<sup>119</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2016.

<sup>120</sup> Renders 2007: 441.

<sup>121</sup> Walls 2012: 71.

<sup>122</sup> APD 2004.

<sup>123</sup> Battera 2004: 17, 19.

<sup>124</sup> Healy 2010: 84; Gordon 1999: 528; Battera 2004: 18f.

<sup>125</sup> See Recognition Somaliland Government, <http://recognition.somalilandgov.com/history/>.

<sup>126</sup> APD 2008: 13.

<sup>127</sup> Interview with Mohamed Hassan Ibrahim, Hargeisa, 22.10.2015.

(2001) where the negotiations led to actual turning points. Light will be shed on ways in which the constitution was negotiated in the formal arena of the negotiation tables which were a central mechanism within the 'traditional' Somali conflict resolution mechanism. Therefore, despite all disputes and disagreements, mutual recognition among the participants can be regarded as crucial and has been supported to reach a consensus on the Somaliland Constitution of 2001.

### 1 *The Kick-Off: Burao Conference*

The Burao Conference (Grand Brotherhood Conference of Northern Clans<sup>128</sup>) of 1991 can be regarded as the kick-off negotiation table for extensive peace building efforts, underpinned by constitution making<sup>129</sup>. Brokered by institutionalised clan authorities (*guurti*)<sup>130</sup> and the SNM (*Somali National Movement*), this conference led to a historical caesura. The secession agreement in the form of a 'declaration of the restoration of Somaliland sovereignty on 18 May, as well as the reconciliation in the Northern regions'<sup>131</sup>, represents a turning point in the many months of negotiations between the different clans and sub-clans. It led to the agreement of a two-year interim government led by the SNM<sup>132</sup> which should have prepared the country for the transfer of power from the central committee of SNM, the establishment of political parties, elections and for a constitution. The SNM interim government, which was 'mandated [by the *guurti*] for disarmament and constitution making'<sup>133</sup>, was not able to produce a transitional constitutional document (due to military re-negotiations in the negotiation arena between Isaaq clans and former SNM, intra-SNM conflicts<sup>134</sup>). However, a remarkable feature of Somaliland's constitution-making process is that the former liberation movement, the SNM, handed over power in 1993 to people who had never fought in the SNM. Therefore, the *guurti* 'which were not only crucial in this transition period, but throughout the constitution-making process, has been much more influential than the nascent government of Somaliland'<sup>135</sup>, 'because we knew that is the only applicable and successful system which works'<sup>136</sup>. When taking a closer look into the involvement of international actors at the Burao negotiation table and during the two following years, it became obvious that Somaliland political actors negotiated rather

<sup>128</sup> 'Representatives of all the Northern clans, including politicians, diaspora, business people, poets, women, religious men and traditional elders attended, with nominated delegates participating in the formal proceedings' (APD 2008: 32).

<sup>129</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015; Boobe Yusuf Duale, Hargeisa, 27.10.2015.

<sup>130</sup> 'A clan body [which] became mediation and reconciliation body for SNM ... a tool of the movement [SNM] and the utilisation of the *guurti* made the traditional institution a part of the movement's apparatus'. Since 1990 the *guurti* expanded their role to include all Somaliland clans it formally institutionalised into an SNM governing structure as a separate branch of leadership (see comprehensively Richards 2014).

<sup>131</sup> APD 2008: 37–40.

<sup>132</sup> These two years were guided by the SNM constitution of 1981; see Richards 2014.

<sup>133</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>134</sup> APD 2008: 41.

<sup>135</sup> Hoehne 2013: 204.

<sup>136</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.



amongst themselves. For example, in 1992, 'a resolution [was] handed over to UNOSOM by the *guurti* requesting [military] non-interference to avoid the escalation of internal conflicts and widening the conflicts between the clan'<sup>137</sup>, but they were open to obtaining international support for 'disarmament and demobilisation'<sup>138</sup>.

## 2 *Borama Conference Paves the Way: A National Charter for the transition period*

The next 'turning point' was an agreement reached at the Borama Conference of the Somaliland Communities in 1993 where 150 official delegates and no less than 500 observers took part<sup>139</sup>. Some minority clans were not represented, but a delegation of 17 women did attend<sup>140</sup>. At this conference, 'everything was open; was put on the table'<sup>141</sup>. The Borama negotiation table is regarded as a 'model of Somali negotiation, which tends to work on the basis that consensus'<sup>142</sup> as well as a watershed in Somaliland's constitution making and political reconstruction since the *de jure* transition from a military to a 'civilian' government. Besides reconciliation among the different (sub-)clans, negotiations revolved around the issue of a suitable system of government<sup>143</sup>. According to Boobe Yusuf Duale, a key issue was:

[...] whether we take a parliamentary system, a presidential system, or a five-rotating presidents system. The people wanted to go for presidential system to have a fist which should unite from war. This Somali society, if you tell them the prime minister is more stronger than the president, they will never believe you.<sup>144</sup>

After spending four months at the negotiation table, a *Peace Charter* as well as the *Somaliland National Charter (Axdiga Qaranka)* (NC)<sup>145</sup> was agreed by the delegates under the aegis of the self-selected body *guurti* [which became 'constitutionally codified within the National Charter as a body with both legislative and traditional or cultural responsibilities within the hybrid government'<sup>146</sup>]. Previous analysis has shown that 'there was a constant process of setting

<sup>137</sup> Interview with Addilahi Ibrahim Hapane, Hargeisa, 18.11.2015.

<sup>138</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

<sup>139</sup> Hapane 2009: 30.

<sup>140</sup> 'That group reiterated the position of UNOSOM stated in the lead-up meetings, supported the formation of a national *guurti*, and demanded a greater role in future conferences' (APD 2008: 49). Moreover, it is interesting to note, the pressure applied by women's groups for a greater involvement in the political process did result in the appointment of Somaliland's first female Minister.

<sup>141</sup> Interview with Mohamed Hassan Ibrahim, Hargeisa, 22.10.2015.

<sup>142</sup> APD 2008: 53.

<sup>143</sup> Ibid.: 51f.

<sup>144</sup> Interview with Boobe Yusuf Duale, Hargeisa, 27.10.2015; see also APD 2008: 53.

<sup>145</sup> APD 2008: 50–3.

<sup>146</sup> Richards 2014: 137f.

deadlines, putting pressure on groups and an immense amount of hard work by the various individuals and groups that took on mediation roles [... and] there were ad hoc groups, who through persistence and good will were able to convince antagonists of their trustworthiness and commitment<sup>147</sup>.

Accordingly, essential features of the five months negotiations were dynamic deadlines, mediation and behind-the-scenes lobbying<sup>148</sup>.

Finally, the *National Charter* 'laid the foundation for Somaliland's stability and statehood'<sup>149</sup> which was supposed to serve as constitutional document (Art. 5 NC) for an interim period of two years. The NC can be seen as the 'forerunner to the constitution'<sup>150</sup>. It paved the way for the transition to a government rule and civilian administration<sup>151</sup>.

Another crucial factor 'was the lack of international intervention, which seems to have exercised a maligned influence on some of the critical peace and trust-building processes'<sup>152</sup>. The absence of conditionalised 'state-building' assistance gave 'more room for a pluralistic world with varying political communities with different norms and practices'<sup>153</sup>. However, the 1993 conference was supported by 'a combination of external but clan-based facilitation and logistic support. For instance, UNDP supplied air transport for delegates'<sup>154</sup>. The UNOSOM mission did not offer any support, whereas a number of foreign governments, INGOs and faith groups contributed<sup>155</sup>. 'Some INGOs [were] supported via local NGOs'<sup>156</sup>, e.g. 'for that conference we [SORRA] raised funds through the Swedish "Life and Peace Institute" and the US based Mennonites; all together 100,000 USD. Since the conference lasted for almost five months it was rather a drop in a bucket'.<sup>157</sup> The (I)NGOs stayed away from the negotiation table, because 'it would have been really not effective if we had interfered. It was effective, because they were doing it in the traditional way.'<sup>158</sup> Decisions were therefore made by local actors and: 'external funding did not disproportionally dominate, and outsiders did not establish frameworks and deadlines beyond the immediate release of funds'<sup>159</sup>. Since 'there was no money at all, people were eating, and drinking, and coming to the conference, there was no per diem, or anything, people who came with their pocket money, or they asked their relatives in Europe or US to send money because they stayed long for the meeting'<sup>160</sup>. Moreover, 'loans from the shops, the butchers,

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<sup>147</sup> APD 2008: 54.

<sup>148</sup> Ibid.: 55.

<sup>149</sup> Ibid. 2015: 16.

<sup>150</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>151</sup> See Renders 2012: 118.

<sup>152</sup> APD 2008: 54.

<sup>153</sup> Osman 2013: 52f.

<sup>154</sup> APD 2008: 48.

<sup>155</sup> Ibid.

<sup>156</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

<sup>157</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015; Addilahi Ibrhaim Hapane, Hargeisa, 18.11.2015.

<sup>158</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>159</sup> Walls 2012: 83.

<sup>160</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

from everybody' were taken as well as 'our diaspora [sent] money for us'<sup>161</sup>. Thus, the main funding for facilitating the conference was contributed by domestic and Somaliland diasporic actors through their specific initiatives and campaigns<sup>162</sup>.

Adan Abokor comments on the main mechanism that led to the 'success' of the Borama Conference:

[T]hat traditional mechanism was giving you time; you don't rush things. [...] There was no time frame, it continued, and continued, they were meeting days and days. When they had a hiccup, or a bottle neck, they stopped for a few days. The conference was not continuing for few days. Then the clans will go inside the same town and would go and have separate meetings. Then they go back, they had their own separate meetings and then they come with a resolution, with a reconciliation proposal. Then they reconcile and continue. They find a way to agree through consensus, because there was no voting, all was based on consensus.<sup>163</sup>

### 3 The Troublesome Constitution-Drafting Processes

The life of the *National Charter* needed to be extended beyond the agreed two years due partly to violent political (re-)negotiations among the political elites. The *House of Representatives* (HoR) was entitled to set-up a constitution drafting negotiation table (Art. 11T1B NC). Accordingly, early 1994 the HoR nominated an eleven-member *National Preparatory Committee of Somaliland's Constitution* (constitutional committee) supposedly to reflect 'the structure of the people'<sup>164</sup>. In response to the former president's Mohammed H. Egal (1993–2000) dissatisfaction with the committee's composition (the 'parliament nominated itself'<sup>165</sup>), another 20-member consultative body comprising legal experts, traditional and religious authorities and politicians was appointed<sup>166</sup> to draft an *Interim Constitution*.

The constitutional committee developed its own internal regulations, a work plan and a timetable<sup>167</sup>. The work plan foresaw a comprehensive public consultation process at district, regional and national levels<sup>168</sup>. The committee began a productive consultation process and influential clan elders, intellectuals, businessmen, professional groups, religious leaders as well as women discussed the major constitutional principles based on previous political history, such as debating

<sup>161</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

<sup>162</sup> Interview with Addilahi Ibrhaim Hapane, Hargeisa, 18.11.15; Abdil Qadr Jirde, 28.10.15; Adan Abokor, 12.11.15; APD 2008: 47f.

<sup>163</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>164</sup> National Preparatory Committee of Somaliland's Constitution 1994.

<sup>165</sup> Interview with Addilahi Ibrahim Hapane, Hargeisa, 18.11.2015.

<sup>166</sup> National Preparatory Committee of Somaliland's Constitution 1994.

<sup>167</sup> APD 2004: 4.

<sup>168</sup> National Preparatory Committee of Somaliland's Constitution 1994, APD 2004: 4.

centralised versus decentralised approaches<sup>169</sup> even though the necessary financial support was not granted by the president to implement the strategy in full<sup>170</sup>.

Moreover, the work plan tasked the members of the committee to collect different sample constitutions 'specifically those socio-economic[ally] comparable to our country as well as Islamic jurisprudence [... in order] to draft a document integrating the best elements of our traditional heritage, [I]slamic tenants, and principle features of plural democracy, bearing in mind that the moral ethos of our tradition is based on Islam [...]'.<sup>171</sup> 'Members were travelling to neighbouring countries'<sup>172</sup>. According to Abdil Qadir Jirde, '[w]e asked our members to gather as much as they can'.<sup>173</sup> The case studies include not only the former Somali constitutions of Somalia (1960 and 1979) and the SNM constitution, but also those of Ethiopia, Djibouti, Yemen, Uganda, Nigeria, Namibia, as well as from the India, United States and European countries such as France, UK and Germany<sup>174</sup>.

Third, the work plan also reflects an agreement on seeking external expertise as well as support for finance and logistics.<sup>175</sup> Since the former president Egal was not convinced by the committee's performance, it is interesting to note that he advertised in the magazine *The Economist* mid-1990s 'for a legal expert to draft a democratic constitution for a Muslim country'<sup>176</sup> to assist the committee. The Sudanese constitutional expert Mohammed I. Khalil joined the negotiation table. Even though the presidential system had already been agreed in Borama and inscribed in the *National Charter* (which goes back to the SNM experience)<sup>177</sup>, severe disagreements arose between the President and the committee regarding assistance of the 'foreign expert'<sup>178</sup> and the concrete constitutional design.<sup>179</sup> Since no compromise could be reached, Egal set up an extra small negotiation table in addition to the National Preparatory Committee who wanted to draft 'a popular constitution with all the intent of the Somali, Islamic, and traditional culture'<sup>180</sup>. Egal entrusted the external expert to draw up a separate draft<sup>181</sup>. This political move can be considered as another 'turning point', setting in motion new negotiation dynamics. Egal shifted not only resources to the new negotiation table but also made sure that the draft 'suits an executive president who has the powers of the president of the U.S.'.<sup>182</sup> This increased the confrontation between the executive and legislative branch of government even further. Finally, two drafts, one by the committee and one by the external consultant, were produced based on

<sup>169</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>170</sup> Interview with Mohamed Said Hersi, SOLLA, Hargeisa, 16.11.2015.

<sup>171</sup> National Preparatory Committee of Somaliland's Constitution 1994.

<sup>172</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>173</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>174</sup> Ibid.

<sup>175</sup> National Preparatory Committee of Somaliland's Constitution 1994.

<sup>176</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>177</sup> See National Charter 1993; Interview with Abdirahman Aw Ali, 01.11.2015; Boobe Yusuf Duale, 27.10.2015.

<sup>178</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>179</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

<sup>180</sup> Interview with Boobe Yusuf Duale, Hargeisa, 27.10.2015.

<sup>181</sup> Renders 2012: 156f.

<sup>182</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

a presidential system, but the committee's version advocated for a strong legislative branch, whereas 'Egal's draft' favoured greater executive powers. The latter 'created a "Monster" executive' as described by Abdirahman Aw Ali Farah, Vice-President during that time (1993–97)<sup>183</sup>.

#### 4 *Reconciling Constitutional Ideas: Around the Hargeisa Conference*

The *Hargeisa Grand Conference of the Somaliland Communities* of 1997 was the next negotiation table, not only set up to deal with the renewal of violent conflicts but also with the deadlock between the President and the Parliament over the formation of the 'permanent' constitution. At this negotiation table, the 315 voting delegates 'finalized the reconciliation after internal military fighting between the government and fighting factions of some clans (1994–96)<sup>184</sup> and came up with a new draft of the Somaliland Interim Constitution (IC), the next 'turning point'. In a process involving heated political debates in the government and in the media, the two constitutional drafts were moulded into the *Somaliland Interim Constitution* of 1997 within four months<sup>185</sup> by a 15-member committee selected from the delegates.<sup>186</sup> Since the committee members 'were hand-picked by the president Egal', he could secure a degree of control over the process<sup>187</sup>. The IC was intended to serve for three years, at which point a 'permanent' constitution was supposed to be decided on by a popular referendum. Analysis has shown that 'the establishment of the new government structure signalled the beginning of the political displacement of the clan elders as independent, pivotal political actors'.<sup>188</sup>

The task of the newly-established committee for drafting the constitution was to reconcile legislative and executive sentiments: 'We, the fifteen of us came up with a compromise. We adopted some articles from this side and some articles from that side'<sup>189</sup>, 'with 2/3 majority for each article'<sup>190</sup>. Some major contentious issues such as identity or nationality, role of religion and Islamic law, and decentralisation<sup>191</sup> needed to be compromised. As it was predominantly a political compromise, the fusion of the two drafts, based mainly on the detailed legislative draft, did not satisfy the president's expectations in terms of division of powers between the legislative and the executive branches and neither did the Islamic connotation of the constitution.<sup>192</sup> Significant negotiations were once again required until finally another ad hoc committee was established, the joint 24-member *The Constitution Revision Committee* of both the *House of Representatives* and the *House of Elders*. At

<sup>183</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

<sup>184</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>185</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015; Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>186</sup> Interview with Addilahi Ibrahim Hapane, Hargeisa, 24.10.2015; Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>187</sup> Richards 2014.

<sup>188</sup> Renders and Terminden 2011: 184.

<sup>189</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>190</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.10.2015.

<sup>191</sup> Interview with Boobe Yusuf Duale, Hargeisa, 27.10.2015.

<sup>192</sup> Interview with Addilahi Ibrahim Hapane, Hargeisa, 18.11.2015.

this last constitution drafting negotiation table, additional amendments of the *Interim Constitution* were negotiated and finally approved before leaving the final approval to a 'popular referendum'.

When taking a closer look at the external actors to be found at the negotiation tables around the Hargeisa conference, only the Sudanese expert had an actual seat at the table. Beyond the negotiation table, legal support came from the European diaspora network through comments on the different constitutional drafts.<sup>193</sup> Not only the diaspora, also the business community also supported the government financially and became a stabilising factor in the early 1990s<sup>194</sup>. Alex De Waal commented once that Somaliland emerged as a business deal (a profit-sharing agreement among the dominant livestock traders), with a constitution attached<sup>195</sup>. Both, the business and the religious communities<sup>196</sup> supported the parliament during the disagreements between the executive and legislative branches when the president shifted resources towards the Sudanese expert<sup>197</sup>. Even though those 'donors' were not directly sitting at the negotiation table, they pushed certain ideas, which can be seen in, for example, a system of a free market economy or *The House of Elders [guurti]* and *The Ulema Council*<sup>198</sup> enshrined in the constitution<sup>199</sup>.

It is interesting to note that even though the constitution-making process was 'home-made', it was also inspired by and interrelated to regional and global political dynamics<sup>200</sup>; in particular, the 'failing' peace and state building efforts in Somalia, which were massively brokered and assisted by the international community<sup>201</sup>. By affirmatively pointing the finger to 'the brother Mogadishu we don't want to be', their own identity was constantly reassured. Global events left their mark on the document as well, e.g. 'in the previous constitution there was a clause: the two Houses need to vote on the impeachment of the president. It was when the former US president Clinton was under impeachment [Monica Lewinsky affair]. So they took the system of the Americans.'<sup>202</sup>

With regard to the lack of direct international influence, Abdil Qadir Jirde, member of the *Constitution Preparation Committee* comments:

We had to go to the internet, talk to people, collect as many as constitutions as possible, from Islamic countries, from Pakistan, Yemen, Egypt, and from the region, from Europe. So it was not organised well. We would have admired a consultant. But, whenever there is funding from the outside or from U.S., I am not an advocate of a person holding the agenda. This changes now here. I remember

<sup>193</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>194</sup> Conversation with Mark Bradbury, Hargeisa, 27.10.2015.

<sup>195</sup> De Waal 2003.

<sup>196</sup> Interview with Mohamed Seid Gees, Hargeisa 17.11.2015; Mark Bradbury, Hargeisa, 27.10.2015.

<sup>197</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>198</sup> Ibid.; Interview with Addilahi Ibrahim Hapane, Hargeisa, 18.11.2015.

<sup>199</sup> See Preamble, Art. 11, 57–79, 115, Constitution of the Republic of Somaliland.

<sup>200</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>201</sup> See Walls 2012: 79–81.

<sup>202</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

what was happening in Southern Sudan, too many, too many experts [...].<sup>203</sup>

Before looking in more detail at the exclusion dynamics at the negotiation tables, the last 'turning point' which was crucial for reshaping the constitution-making dynamics should be addressed. After a decade of combination of political and military (re-)negotiations, the *Constitution of the Somaliland Republic* was overwhelmingly approved in a nationwide popular referendum held on 31 May 2001. According to the Somaliland government, 97.7 per cent of the 1.19 million voting people approved the constitution<sup>204</sup>. The people *de facto* voted on the secession clause (Art. 1 of the Constitution). It was a *de facto* referendum on 'sovereignty', on Somaliland's independence<sup>205</sup>. Thus, the approved constitution not only established a legal framework for the structure of governance, but also 'legalised the existence of a state called Somaliland'<sup>206</sup>. The setup of the final crucial negotiation table was guided by the political actors in power: they stipulated that anyone who is against the constitution is ultimately negating the idea of the existence of the Republic of Somaliland.<sup>207</sup>

There was some kind of a campaign that has branched through all sources of the media, and the media institutions that the people voting for the constitution are recognizing the identity and the existence of Somaliland. [However, the] referendum did not reach the disputed areas.<sup>208</sup>

The people were familiarised with the constitution through oral and written media. The media covered the process and the people involved as well as the respective constitutional stipulations were published and discussed.<sup>209</sup> The referendum was boycotted in Eastern parts of Somaliland<sup>210</sup> and various opposing forces campaigned against the constitution (e.g. some religious actors as well as political groups who pleaded for an extension of the *Interim Constitution*) as they saw a lot of unresolved critical issues in the final document of the CSR and objected to the powers given to the executive branch of government. Civil society actors also complained about the lack of public consultation during the drafting process<sup>211</sup>:

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<sup>203</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>204</sup> APD 2004: 6.

<sup>205</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>206</sup> Interview with Boobe Yusuf Duale, Hargeisa, 27.10.2015.

<sup>207</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015; Boobe Yusuf Duale, Hargeisa, 27.10.2015.

<sup>208</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>209</sup> Interview with Mustafa Said Denbi, Hargeisa, 27.10.15; Mohamed Ahmed Mohamoud, Hargeisa, 27.10.2015.

<sup>210</sup> See Hoehne 2009: 252–81.

<sup>211</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015, Boobe Yusuf Duale, Hargeisa, 27.10.2015.

The public was given too little time to grasp the issues and discuss cogently the draft constitution, which they considered flawed in some fundamental respect [...] and accusing the government of playing on the public's strong support for independence, when in fact it should have given a fair chance for public acceptance or rejection of the constitution.<sup>212</sup>

Due to the specific political dynamics the constitution making was rather government driven, lacking public input and therefore genuine legitimacy<sup>213</sup>.

### 5 *Local Exclusion Dynamics: Where are the voices of more than half of the population?*

The political bargaining did not seem to leave much space for civil society actors, women, minority groups<sup>214</sup> and opposition<sup>215</sup> in the constitution-making process. Specifically on the issue of the exclusion-inclusion dynamics of women, Haroon Yusuf commented:

Women were not consulted and that is why it [the constitution] is not gender sensitive and it talks vaguely about men and women equality. It does emphasise the need for capacity building and the role of women in the national processes, in leadership.<sup>216</sup>

The lack of women at the constitution-making negotiation tables<sup>217</sup> seems to be closely tied to the fact 'it were only men who could take part in the clan affairs and in the conflict resolutions'.<sup>218</sup> A Somali saying reflects this: *Dumar quabiina naaha*. It implies that women do not belong to any clan as their loyalty is torn between their father's and their husband's clan<sup>219</sup>; therefore, '[s]ince the conferences were based on clan power sharing, each sub-clan was asked to bring a certain number of delegates to the conference; no clan would bring a woman to the conference'.<sup>220</sup> However, even though women were not directly invited to join the various conferences, they negotiated away from and beyond the negotiation tables as the following contributors have described:

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<sup>212</sup> APD 2004: 5.

<sup>213</sup> Ibid.: 7.

<sup>214</sup> Minority groups were excluded in the beginning, but obtained some voices during the 1997 conference. A few delegates from the 'minority' clans such as the Gaboye were nominated to take part at the negotiations in 1997 (interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015; see also APD 2008: 14, 20f).

<sup>215</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

<sup>216</sup> Ibid.

<sup>217</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>218</sup> Interview with Amina (Milgo) Warsame, Hargeisa, 12.11.2015; Suad Ibrahim Aboi, Hargeisa, 15.11.2016.

<sup>219</sup> NAGAAD 2007: 4.

<sup>220</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.



[W]omen from 1991 onwards were always influencing and supporting reconciliation, they were always the wheels behind it, mobilising elders, because women are always the first ones to be affected by war, the first victims.<sup>221</sup>

[W]omen were the one preparing the venue, cooking food, contributing ideas, collecting money, all the logistic support.<sup>222</sup>

To strengthen the voice of women and 'to contribute to the development of the country'<sup>223</sup>, some women's activists had already started to institutionalise themselves in 1991, motivated by the desire to be part of the official process of peace, state and constitution making:

Women came together and said it is time for us to push the agenda forward. They contacted the government and said women's role is missing. We are the majority of Somaliland's society [...]. They prepared a statement submitted to the House of Elders in 1993 demanding seats [...].<sup>224</sup>

Even though they were granted only a few seats by the House of Elders, Amina Milgo Warsame remembers: 'we sat there, listened there, but had no participation, and at the end, they just read the piece of paper saying that we are also citizens of Somaliland and we have to take part'<sup>225</sup>. Since women were also not invited to the 1997 Hargeisa conference, they again sent a written complaint to the President and to the *guurti*<sup>226</sup>.

[We] requested fifty per cent share at Hargeisa conference, but they granted only six observer status slots. Long discussions whether to boycott the conference, but if we refuse to attend the meeting then nobody will talk about the women's issues.<sup>227</sup>

'The constitution making went without women'<sup>228</sup>, even though we requested a women's quota in parliament, specific women rights and protection from harmful cultural practices such as FGM<sup>229</sup>. Accordingly,

[t]hey did advocacy, and mostly they were behind the decision makers, they were compelling the men to decide on peace

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<sup>221</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>222</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015.

<sup>223</sup> Ibid.

<sup>224</sup> Interview with Suad Ibrahim Aboi, Hargeisa, 28.10.2015.

<sup>225</sup> Interview with Amina (Milgo) Warsame, Hargeisa, 12.11.2015.

<sup>226</sup> Interview with Suad Ibrahim Aboi, Hargeisa, 28.10.2015.

<sup>227</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015.

<sup>228</sup> Interview with Suad Ibrahim Aboi, Hargeisa, 28.10.2015.

<sup>229</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015.

agreements. They were the backbones. [...] they were suggesting as a group for their ideas.<sup>230</sup>

The main means of mobilisation the (urban) women's network used to influence the process were organising demonstrations, submitting written declarations to the conference delegates to sign an unconditional peace agreement<sup>231</sup> and utilising personal contacts and family ties to influential members of the constitutional preparatory committee 1997<sup>232</sup>.

## 6 No International Constitution-Making Toolbox

When considering the lack of international intervention, the following anecdote illustrates the dilemma the emerging state faced in the 1990s: President M. Egal told a British MP in Hargeisa in 1993, 'How can a local NGO [ActionAid] invite you to my country? I am the president of this country'. Haroon Ahmed Yusuf who was present during this conversation commented:

Even though Egal was rebuilding the government, he did not have funds and he knew [...] all the international money was going into INGOs, local NGOs, civil society groups, but nothing to the government. And he had to rebuild these institutions. It was his point that don't you recognise me and give me funds to my government rather than NGOs.<sup>233</sup>

It is therefore possible to say that, on the one hand, this situation unintentionally granted Somaliland's actors space to negotiate their 'own' way of governance as no blueprints were available.

Abdulrahman Aw Ali (Former Vice-President) emphasised the local dispute mechanisms:

We resorted it in our traditional way of peace making. Somalis have been always warrior, always disputing, have conflicts with each other, but they always solve their problems by their own without external or foreign elements.<sup>234</sup>

Mohamed Farah Hersi (Director Academy for Peace and Development):

If external actors were directly involved, the way it was drafted would not have been the same... not only in terms of legitimacy, but

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<sup>230</sup> Interview with Addilahi Ibrahim Hapane, Hargeisa, 18.11.2015.

<sup>231</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015; APD 2008: 20f.

<sup>232</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015.

<sup>233</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

<sup>234</sup> Interview with Abdirahman Aw Ali, Hargeisa, 01.11.2015.

in terms of how you manage the process and how at the same time get what you want [...].<sup>235</sup>

Abdil Qadir H. Ismail Jirde (MP, Committee of Provisional Constitution of 1996):

Somaliland has been lucky in the sense that we were ignored by the international community at the stage we were setting up... Because there were no blueprints. But we missed that. But at least the mistakes are ours and we can live with our mistakes. But now, I am very much frightened, because any reform we do now, is coming through aid agencies...it becomes aid driven.<sup>236</sup>

On the other hand, local actors seemed to want supplementary support, as the following statements illustrate:

We did not object their [international community's] involvement, but everybody was interested in Somalia per se, but there was no interest in Somaliland. It was a blessing in disguise, because nobody interfered. It is ironic. Those days we were very bitter with the international community. We asked for support, but nobody was interested.<sup>237</sup>

It was a blessing that they [international community] were not involved in the peace and reconciliations of Somaliland. But the international community support was very important during the democratisation process, that is what Somaliland really needed in terms of technical and financial they have supported.<sup>238</sup>

Somaliland had a lot of external support, but I think without interfering in the local process, but supporting local capacities... through the support of international NGOs.<sup>239</sup>

During the struggle for political participation, especially the marginalised women's activists wished they had more international support:

We wish that there was some kind of support. Of course we did not want, they dictate everything, but they should have facilitated somehow, the process that women knew what to expect, about Human Rights. Everybody was preoccupied with peace, settling down and nobody saw the importance of women. If we had known at that time, maybe we could have put some professionals there, because it

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<sup>235</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2016.

<sup>236</sup> Interview with Abdil Qadir Jirde, Hargeisa, 28.10.2015.

<sup>237</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>238</sup> Interview with Adan Abokor, Hargeisa, 12.11.2015.

<sup>239</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

would be very difficult for women to participate in politics, because of the culture, the tradition.<sup>240</sup>

The support from international community was only for income generation, education. [...] Financial support and training are crucial in the area of women's political participation. There were a lot of candidates, but no funds for campaigns. We need the international community to support the candidates.<sup>241</sup>

The statements demonstrate that the lack of international support was mostly seen as a 'blessing in a disguise'. Even though informants constantly pleaded for provision of technical and financial support they were aware that support is always fused with interests that need to be negotiated<sup>242</sup>. Particularly, international assistance is currently required '[...] for dealing with the current gaps in the constitution'<sup>243</sup>. Many inconsistencies and contradictions become visible with respect to 'political structure; power distribution and responsibilities of the parliament, of the lower and the upper house; the power of the president, independency of the judiciary the composition of the judicial committee as well as the enshrined Bill of Rights'<sup>244</sup>. 'Many [constitutional] articles specify laws to be promulgated which are still missing. It is not a deficiency of the constitution; it is the deficiency of the parliament, of the government'<sup>245</sup>. This last quote illustrates the current status quo and the awareness of the necessity of international assistance:

The locally driven constitution making was good to find a consensus on basic building blocks, but later to deal with diversity or the different normative layers, international support is definitively needed. We need to sustain our people's aspiration, and to give future prospective to the young generations at least... to catch up with the entire world which is now a global one.<sup>246</sup>

Finally, it is possible to say that the constitution-making process in Somaliland shows an innovative approach in terms of developing national mechanisms, dialogue and an approach to mediation. However, the question remains how to proceed from here? The paradoxical 'blessing in a disguise' mentioned above illustrates that the general question remains: what kind of 'assistance' can the international community provide? How to avoid being trapped in the 'aid driven' (liberal) approach to state building? These questions will be addressed in the following section and compared to the contrasting experience of South Sudan.

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<sup>240</sup> Interview with Amina (Milgo) Warsame, Hargeisa, 12.11.2015.

<sup>241</sup> Interview with Shukri Hcir Ismeil, Hargeisa, 15.11.2015.

<sup>242</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2015.

<sup>243</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

<sup>244</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2016; Haroon Ahmed Yusuf, 17.11.2015; Abdirahman Aw Ali, 01.11.2015; Mohamed Said Hersi, 16.11.2015.

<sup>245</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

<sup>246</sup> Interview with Mustafa Said Denbi, Hargeisa, 27.10.2015.

## V Conclusion: What can be learnt from both cases

This comparative study once again validates the scepticism around the way in which internationalised constitution making in war-torn settings is conducted. The South Sudanese case shows that attempts to produce a 'supreme law of the land' out of pre-defined international concepts, modules and templates are misleading. Furthermore, a paternalistic attitude of international actors in the form of a 'care and control mixture'<sup>247</sup> seems to prevail, despite proclaimed 'local ownership'. There is a conceptual dilemma between the idea of 'public ownership' and the project management tools utilised with their convincing logic of 'objective procedures'. The South Sudanese actors in the institutionalised fora negotiate within the normative frames of the international actors. Even though the process of drafting a constitution is exposed to immense political pressure and directly associated with state-building efforts, the provisions of the transitional constitution themselves have already become an obstacle in the quest for 'legal certainty', 'stability' and 'peace'. The Transitional Constitution does not take into account that, in emerging states, numerous issues to be written into the constitution will be contested by a multitude of actors with different claims. Acknowledging some of these claims while *de jure* regulating disputes through legal provisions impedes ongoing negotiation processes and intensifies rather than resolves conflict dynamics. The international 'tool sets' as well as the contested issues inscribed in South Sudan's Transitional Constitution have therefore already become powerful weapons in the hands of a few dominant local actors for them to secure their own interests as 'local ownership' becomes a legitimising tool. Thus, the translation process demonstrates that the localisation dynamics are controlled by local politics and the 'translation results' seem to be contrary to intended Rule of Law ideas. In light of local political dynamics and translation processes, the *de facto* influence of well-intended international interventions seems rather limited.

The Somaliland case clearly indicates that what matters is the process by which a constitution is actually drafted. In order to secure sustainable consensus building in a specific local setting, 'owning' the process seems to be a precondition for gaining legitimacy. However, the Somaliland case also demonstrates that a constitutional draft as a legitimising power tool has been created by inviting external actors to provide it. Nevertheless, a significant difference to the international toolbox provided in the South Sudanese case is that in Somaliland the tool produced by an external actor had been contested and re-negotiated in light of the alternative draft which had been produced locally.

A procedural difference related to the intervention thus becomes apparent when comparing the two cases: 'What is important is how you create that consensus building, and how you create the ownership, and how you create legitimacy'<sup>248</sup>. Accordingly, in Somaliland 'the constitution making was a reconciling attempt rather than a drafting of a constitution'.<sup>249</sup> Consensus production and decision making mechanisms were in the hands of Somaliland's elites during the process

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<sup>247</sup> See Barnett 2016: 23–40.

<sup>248</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2015.

<sup>249</sup> Interview with Mohamed Seid Gees, Hargeisa, 17.11.2015.

which lasted almost a decade, whereas in South Sudan the consensus production has thus far been framed and guided by the powerful international actors who had a seat at the local negotiation table. Their pre-determined international toolboxes do not take local context into account to any great extent. International actors try to produce quick, yet unsustainable 'results' through the support of 'project law'. The internal logic and the proposed process steps laid out a priori limit the variety of modes of possible 'technical assistance' and the ability to rethink a chosen assistance, including the frame or the tools such as taxonomies and project law. This path dependence prevents such fundamental questions as 'to what mode of statehood the South Sudanese people aspire' being addressed. This is exemplified by the way the South Sudanese constitutional arrangements have been produced so far. Not only has the Technical Commission merely 'reviewed' the Interim Constitution of 2005, but the NCRC had a mandate only to 'review' the Transitional Constitution of 2011 instead of 'rewriting' the documents, as well. This inherently avoids a broader consensus production. The Somaliland example shows that Somali political actors have started to compose a constitution from scratch by negotiating the general political design of the state. A severe challenge here is that the international 'prescriptions' of how to produce a constitution perceive emerging South Sudan as a 're-construction' state instead of a 'construction state' without embedding as many of the *de facto* functionary elites as possible. The 'state centred' and 'top down' recipes do not take other powerful actors, including the fragmented traditional or religious authorities, into account to any great degree; similarly, they are not flexible enough to take the 'emerging' nature of the state as a starting point in which the constellations of political actors are changing during negotiations. The actors are in a constant state of disagreement over the issue of who is or is not seated at the negotiation table. The constitution making conducted thus far in South Sudan is therefore not a 'local' product but rather part of the internationalised constitution-making 'industry'; it has not as yet been possible to reach an agreement on sustainable conflict resolution mechanisms.

Moreover, as far as the international actors are concerned, they are advertising their own products or solutions without taking the specific local political culture and socio-political/historical constellations as starting points. The critique to be vested on the side of the respective dominant national actors, they take the international 'products' for their own purposes and benefits as the reality on the ground indicates. This is exemplified in both the South Sudan and Somaliland cases where external actors 'produced' constitutional drafts out of a toolbox in accordance with the desires of the 'customer'. Finally, what 'local actors' accept, adopt and appropriate from the international 'tools' very much depends on whether the 'offer' strengthens their own position. This becomes visible in the negotiation on the constitutionally enshrined comprehensive powers of the president in both countries in this study.

Hence, it can be argued, that even the inherently existing tension between 'local ownership' and 'external intervention' can be productive since it provides space for re-negotiations on different forms of normativity. It may support redefining exclusion and inclusion dynamics, as the Somaliland case suggests, which was not very participatory beyond the political elites as demonstrated by the exclusion dynamics of women or 'minority' clans. However, the process needs to be conducted in an open manner by the local actors themselves in order to avoid

these tensions becoming 'un-negotiable' due to an imposed 'assistance' approach, which only leads to external 'models' being rejected or manipulated according to internal power relations.

This study indicates that, generally, only a locally driven approach can take into account the fact that constitution making is navigated and patterned by the constellations and practices of specific plural actors and is thereby continuously transformed through negotiations and regulations in a specific local setting. Too often the assistance of the international community is not based on reality as the South Sudanese case has demonstrated. 'Too often the aspect of legitimacy is lacking.'<sup>250</sup> The locally driven and owned process in Somaliland supported the production of a legitimate end-product, the constitution, 'because the people felt ownership'<sup>251</sup>. Agreeing with M.H. Osman, the 'major pillar of the constitution has to come from within, based and reflected on historical, socio-political and economic situation'<sup>252</sup>. Moreover, agreeing with M.F. Hersi,

'[o]wnership and legitimacy are interrelated concepts. You have to have ownership of that document and process in order to have the legitimacy. Legitimacy is the outcome of ownership. If you don't own the process you don't have legitimacy'.<sup>253</sup>

This study therefore suggests that the international recipes of the well-intentioned constitutional assistance need to be fundamentally reconsidered in light of the many unintended consequences within the translation processes in war-torn contexts.

It is possible to imagine sustainable international involvement under certain *a priori* conditions: it is essential to have the agreement or approval of all actors at the negotiation table in order to reach acceptance of the negotiation results, i.e. legitimacy of the consensus (*Einigung*). Moreover, another pre-condition is to develop a structural, self-reflective approach which deconstructs the baggage associated with international interventions, namely the hegemonic grid of concepts, research techniques, professional ethics, politics, as well as to examine in detail the (asymmetrical) political implications and interests. Hence, the international contribution to constitution making might instead be limited to sharing experiences, to focusing on common global challenges, and to balancing theory and reality, which requires a consequently procedural but not a managerial 'project' approach. This approach could contribute to the mutual discovery of a spectrum of potential 'solutions'. A precondition is not to rely on an approach which involves specified 'best' or 'good' practices and dominant 'project law', as an appropriate 'option' in one context can be inappropriate in another. Finally, the dictum might be: do not pre-design for 'domestic actors', support them in finding their own appropriate process and (socio-historical) design.

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<sup>250</sup> Interview with Mustafa Said Denbi, Hargeisa, 27.10.2015.

<sup>251</sup> Interview with Haroon Ahmed Yusuf, Hargeisa, 17.11.2015.

<sup>252</sup> Interview with Mohamed Hussein Osman, Hargeisa, 19.11.2015.

<sup>253</sup> Interview with Mohamed Farah Hersi, Hargeisa, 16.11.2015.

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